**NOT FOR PUBLICATION**

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**
**DIVISION OF ST. THOMAS AND ST. JOHN**

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| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | |
| **GELEAN MARK,** | ) | |
| **VERNON FAGAN, aka "Culture,"** | ) | |
| **ALLEN DINZEY, aka "Mow,"** | ) | |
| **DAVE BLYDEN, aka "Kimbi,"** | ) | |
| **KEITH FRANCOIS, aka "Kibo,"** | ) | **Criminal No. 2005-76** |
| **ALEXCI EMMANUEL,** | ) | |
| **ROYD THOMPSON, aka "Killer,"** | ) | |
| **TYRONE ALEXANDER PRINCE, and** | ) | |
| **LEON BOODOO,** | ) | |
| **Defendants.** | ) | |

**ATTORNEYS:**

**Delia L. Smith, AUSA**
St. Thomas, U.S.V.I.
*For the Plaintiff,*

**Robert L. King, Esq.**
St. Croix, U.S.V.I.
*For the defendant Gelean Mark,*

**Stephen A. Brusch, Esq.**
St. Thomas, U.S.V.I.
*For the defendant Vernon Fagan,*

**Bernard VanSluytman, Esq.**
St. Thomas, U.S.V.I.
*For the defendant Allen Dinzey,*

**Karin A. Bentz, Esq.**
St. Thomas, U.S.V.I.
*For the defendant Dave Blyden,*

**Douglas C. Beach, Esq.**
St. Thomas, U.S.V.I.
*For the defendant Keith Francois,*

**Judith L. Bourne, Esq.**
St. Thomas, U.S.V.I.
*For the defendant Alexci Emmanuel,*

**Leonard B. Francis, Esq.**
St. Thomas, U.S.V.I.
*For the defendant Royd Thompson,*

**George H. Hodge, Jr., Esq.**
St. Thomas, U.S.V.I.
*For the defendant Tyrone Alexander Prince,*

**Clive C. Rivers, Esq.**
St. Thomas, U.S.V.I.
*For the defendant Leon Boodoo.*

**ORDER**

**GÓMEZ, C.J.**

Before the Court is the motion of defendant Allen Dinzey ("Dinzey") for a mistrial. For the reasons stated below, the Court will grant the motion.

## I. FACTS

Dinzey and defendants Gelean Mark ("Mark"), Vernon Fagan ("Fagan"), Keith Francois ("Francois"), Alexci Emmanuel ("Emmanuel"), Dave Blyden ("Blyden"), Tyrone Alexander Prince ("Prince"), Royd Thompson ("Thompson") and Leon Boodoo ("Boodoo") have been charged with conspiracy to possess with intent to distribute, and conspiracy to import, cocaine, crack cocaine, and

marijuana. Dinzey has also been charged with distribution of crack cocaine. The trial against Dinzey and his co-defendants commenced on March 5, 2007.

On March 9, 2007, during the government's case in chief, the government called Detective Mark Joseph of the Virgin islands Police Department to testify about certain statements made by defendant Keith Francois ("Francois") after his arrest. During his testimony, Detective Joseph stated:

> THE WITNESS: Mr. Francois stated that he met Mr. Dinzey in a club, and Mr. Dinzey wanted to buy some marijuana.
>
> Mr. Francois stated that he didn't have any marijuana to sell, but he gave Mr. Dinzey his phone number.
>
> Mr. Francois said that Mr. Dinzey contacted him, and that he sold Mr. Dinzey marijuana on several occasions.

(Trial Tr. 191, March 9, 2007.)

The Court was concerned with the Francois admission, which incriminated Dinzey, and promptly halted the testimony and called counsel to side bar:

> THE COURT: All right. We're going to have the side bar now.
>
> (Side-bar discussion held as follows:)
>
> . . .
>
> THE COURT: There's a Bruton issue. That's the issue that I'm concerned with.

. . .

> THE COURT: Hold on. Here is what the Court is going to do. I think from now on, if the government is going to elicit a statement, I want to know what the statement is in writing, to the best that the government can, before –
>
> . . .
>
> To the extent the government is aware, I am instructing the government to provide me with a statement of the witness, if it has, if it involves a statement of any defendant.
>
> [P]articularly if it involves a statement of a defendant that implicates a statement of another defendant, that may implicate Bruton issues, which we have squarely before us now, which I'm a little bit concerned that the government didn't point this particular thing out.
>
> . . .
>
> [T]here's an anticipatory to cure this, which I would have done had I been alerted.
>
> In any event, what the Court will do is give a curative. The curative will --I will ask them to disregard it. As I recall it, it's a statement by Mr. Francois. I will limit it to Mr. Francois only.
>
> . . .

(*Id.* at 191-94.)

Immediately after the side bar discussion, the Court gave a curative instruction to the jury:

> THE COURT: All right. Ladies and gentlemen, there was some testimony from the witness about a statement that Mr. Francois made. That statement should only be used in your consideration, certainly at this point, in relation to Mr. Francois.

> To the extent that that statement made reference to another one of the named individuals in this case, and that statement alleged any improper or illegal conduct, that portion of the statement must be disregarded by you entirely. It cannot be a part of your consideration or your deliberation in this matter.
>
> So to the extent the statement attributed to Mr. Francois mentioned the name of Mr. Dinzey, it cannot be used in your deliberation or consideration as to Mr. Dinzey. It must be stricken and disregarded entirely.

(*Id.* at .)

Dinzey thereafter moved for a mistrial. Dinzey argues that Francois' statement may not be used against Dinzey.

## II. DISCUSSION

The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the right to confront and to cross-examine adverse witnesses.[1] Consistent with that right, in *Bruton v. United States,* the Supreme Court held that the admission of a co-defendant's statement at trial violates the defendant's Sixth Amendment right to confrontation if (1) the statement

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[1] The Confrontation Clause of the Sixth Amendment is also made applicable to the Virgin Islands by Section 3 of the Revised Organic Act, 48 U.S.C. at § 1561.

Both the Sixth Amendment and 48 U.S.C. § 1561 provide, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

U.S. CONST. amend. VI; 48 U.S.C. § 1561.

incriminates the defendant, and (2) the co-defendant chooses not to testify. 391 U.S. 123, 126 (1968). Moreover, the Supreme Court held that the admission of a co-defendant's statement that implicates the defendant at a joint trial may constitute prejudicial error, even though the trial court gave a curative instruction that the statement may only be used against the co-defendant. *Id.* at 124-25, 128-29 (reasoning that the encroachment on a defendant's right to confrontation cannot be avoided by instructing the jury to disregard inadmissible hearsay evidence).

The rule articulated in *Bruton* applies when a witness testifies about a co-defendant's out-of-court statement. *See Monachelli v. Warden,* 884 F.2d 749, 753 (3d Cir. 1987). Accordingly, a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated when a witness testifies regarding a statement made by a non-testifying co-defendant implicating the defendant. *Id*.

## III. ANALYSIS

Here, the government concedes that a *Bruton* violation occurred when Detective Joseph testified that Francois admitted

involvement in the sale of controlled substances to Dinzey.[2]

Despite this concession, the government argues that the trial should proceed without a mistrial because the violation was harmless error. The government contends that the evidence against Dinzey at this point in the trial is overwhelming. It also argues that the Court's curative instruction to the jury should suffice to ameliorate any prejudice that may result from Detective Joseph's testimony. The government's arguments are without any support in the law.

While *Bruton* violations are subject to harmless error review at the appellate level, the harmless error doctrine does not apply at the trial court level. *Hodges v. Rose*, 570 F.2d 643, 647 (6th Cir. 1978). As the Sixth Circuit has explained:

> [A] trial court cannot decide on the admissibility of a statement under *Bruton* on the basis of the strength of the state's case. Rather, the court must decide whether the statement incriminates the defendant against whom it is

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[2] The Court agrees that Detective Joseph's testimony about Francois' post-arrest statement clearly violated *Bruton.* Indeed, Francois' statement was "incriminating on its face," and "directly implicated" Dinzey in the drug trafficking conspiracy. *See Bruton,* 391 U.S. at 124 n.1 (finding that a witness' trial testimony regarding a co-defendant's out-of-court confession that he and the defendant had committed armed robbery was "powerfully incriminating"). In this case there is a substantial risk the jury will consider Francois' statement in deciding Dinzey's guilt. Because Francois has elected not to testify, Dinzey may not cross-examine Francois. Accordingly, Dinzey's Sixth Amendment right to confrontation of adverse witnesses has been violated.

> inadmissible in such a way as to create a "substantial risk" that the jury will look to the statement in deciding on that defendant's guilt. . . . [C]onsideration of the weight of independent evidence is both improper and unnecessary to determination of the *Bruton* issue at the trial court level.

*Id.; see also United States v. DiGilio*, 538 F.2d 972, 982 (3d Cir. 1976) (holding that "[t]he harmless error rule is not a predicate for the admission of evidence" and "expressly disapprov[ing] of the suggestion that there is a 'parallel statements' exception to the *Bruton* rule").

Furthermore, in a joint trial, limiting instructions on the use of a co-defendant's confession incriminating a defendant are an inadequate substitute for a defendant's Sixth Amendment right to confrontation. *Bruton*, 391 U.S. at 137. As the Supreme Court has recognized:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great . . . that the practical and human limitations of the jury system cannot be ignored.

*Id*. at 135; *see also Gov't of the V.I. v. Pinney,* 967 F.2d 912, 918 (3d Cir. 1992) ("[C]ourts must take a realistic view of the capabilities of the human mind and must, therefore, acknowledge that there are situations in which the risk that jurors will not follow the court's instructions is unacceptably high."). Indeed, if the risk is substantial that the jury will consider the incriminating extrajudicial statements against the defendant, the

effect of limiting instructions "is the same as if there had been no instruction at all." *Bruton*, 391 U.S. at 137.

Given the procedural posture of this matter and the openly-incriminating nature of Francois' statement, it is clear that this trial cannot proceed in its normal course against Dinzey. Accordingly, the Court must determine the appropriate remedy for a *Bruton* violation that occurs in the midst of trial.

**A. Remedy for Mid-Trial *Bruton* Violation**

In *Bruton*, the Supreme Court suggested that, unless all references to the defendant are effectively deleted from the co-defendant's statement, the trial judge must either refuse to admit the statement or sever the trial of that defendant. *Id.* at 134 n.9. Of course, "[w]here the confession is offered in evidence by means of oral testimony, redaction is patently impractical." *Id.* (citation omitted). Furthermore, since a defendant may only be severed prior to trial, the remedy for a mid-trial *Bruton* violation would be a mistrial as to the defendant implicated by the inadmissible statement, rather than severance of such defendant. *See United States v. Blankenship,* 382 F.3d 1110, 1119 n.20 (11th Cir. 2004) ("A defendant making a midtrial motion for severance is essentially arguing that

circumstances have developed to the point where it would be unfairly prejudicial to allow the trial to proceed.").

Here, redaction of Detective Joseph's oral testimony is impossible. It is also too late to suppress the testimony regarding Francois' confession. Severance of Dinzey appears to be the only legally fair and viable option available to the Court. Exercising that option, however, requires the declaration of a mistrial.

Considering all of the attendant circumstances, the Court finds that there is manifest necessity for declaring a mistrial in this case. *See, e.g., Arizona v. Washington,* 434 U.S. 497, 498 (1978) (holding that the defense counsel's improper statements created manifest necessity for the state trial court to grant the prosecution's motion for a mistrial). The *Bruton* violation occurred during Detective Joseph's oral testimony in open court and was heard by the jury. Dinzey thereafter moved for a mistrial. As discussed above, neither redaction, suppression, nor a curative instruction can cure that violation. While Dinzey seeks a declaration of a mistrial and a dismissal of the Second Superseding Indictment with prejudice, the Court finds that there is no prejudice in the retrial of Dinzey to warrant dismissal with prejudice.

Accordingly, it is hereby

**ORDERED** that a mistrial is declared with respect to Dinzey; and it is further

**ORDERED** that a new trial date will be set for the retrial of Allen Dinzey.

**Dated: March 14, 2007**

**/s/**
**CURTIS V. GÓMEZ**
**Chief Judge**

**ATTEST:**
WILFREDO F. MORALES
Clerk of the Court

By: /s/
Deputy Clerk

Copy: Hon. Geoffrey W. Barnard
Delia L. Smith, AUSA – fax: 776-3474
Robert L. King, Esq. – fax: 774-5299
Stephen A. Brusch, Esq. – fax: 776-2238
Bernard VanSluytman, Esq. – fax: 777-8597
Karin A. Bentz, Esq. – fax: 774-2665
Douglas C. Beach, Esq. – fax: 776-8044
Judith L. Bourne, Esq. – fax: 776-1270
Leonard B. Francis, Esq. – fax: 774-2863
George H. Hodge, Jr., Esq. – fax: 776-2605
Clive C. Rivers, Esq. – fax: 776-4525
Marcia G. Shein, Esq. – fax: (404) 633-7980
Mrs. Trotman
Ms. Donovan
Mrs. Schneider
Bailey Figler